In the District Court of Philadelphia, March 31, 1860.

ALLEN *vs.* PETERS.

1. An unanswered letter, offered by the party writing it, if it be restricted to making a demand, where this is required, or merely giving notice, is admissible evidence; but if it contains statements framed for a different purpose, and such statements derive no support from the other evidence in the cause, it is inadmissible.
2. If such letter does not go beyond demand or notice, or contain other consentaneous evidence, the whole may be submitted to the jury; but the court will scan its contents rigorously, and so instruct the jury, that undue weight shall not be given to such evidence.

The opinion of the court was delivered by

STROUD, J.—The declaration of the plaintiff contains all the common money counts in *indebitatus assumpsit*, but no special count.

The trial took place on the 1st of last February, and resulted in a verdict for the plaintiff for $324 35.

It is not necessary to go *at large* into the evidence given on the trial, inasmuch as we are all of opinion that the verdict must be set aside, on account of misdirection, or rather of the want of full direction, in the charge, as to the effect of a letter written by the plaintiff to the defendant. This letter will be particularly noticed hereafter.

It may be briefly stated, that the action was brought to recover $300, as the price paid by the plaintiff to the defendant for a horse —one of a pair which the defendant sold and delivered to the plaintiff. The price paid for the pair was $600, and the defendant gave at the time a receipt for "six hundred dollars in full for one pair of gray horses, which I warrant sound."

A few days after the purchase, one of the horses, whilst driven alone attached to a light vehicle, took fright, and was with difficulty restrained. At the instance of the plaintiff, this horse was taken back by the defendant, and another horse supplied in his place.

The plaintiff alleged that this last horse was not received by him as a substitute and permanent exchange for the horse which had taken fright, but was a mere *loan*, under an agreement that it might

be used for a while, and until another and better horse (a proper match for the *unexceptionable* horse of the original pair) should be procured by the defendant and delivered to the plaintiff.

After the lapse of five months, (in which interval the defendant sent a horse to the plaintiff, but it was larger and less sightly than was desired, and was at once returned,) the plaintiff sent the horse, which he had received in the place of the *frightened* one, to the defendant, who immediately ordered the messenger to take it back to the plaintiff. This was accordingly done.

On the 11th of April, 1859, the plaintiff wrote and sent to the defendant this letter:

DEAR SIR: I return to-day the horse which you loaned me until you could furnish me with another horse, for the one I purchased from you for three hundred dollars, and returned to you on account of his being unkind and not free from vice, as you represented him to be.

You are hereby notified, that unless, on or before April 28th inst., you either furnish me with a horse that pleases me as well as the one I now have, which I purchased from you, or a horse as valuable as the one purchased at the same time, which I first returned to you, would have been had he been kind and free from fault, as you represented him, in accordance with the terms of our contract, I shall consider that you have abandoned your said contract, and I shall look to you for repayment at once of the said sum of three hundred dollars—this being the price I paid you for the horse first returned on account of being unkind.

The defendant took the letter, read it before the bearer, and told him to take the horse again to the plaintiff. The horse was immediately taken back, and still remains with him. This letter was offered in evidence by the plaintiff, and received and read to the jury.

No reply was ever made to it by the defendant, except what was orally said, directing the horse to be taken away.

In the charge, the jury were told, that if they should find, from the evidence, that the original contract between the parties was, that the pair of horses purchased by the plaintiff from the defendant was on a condition, that if a particular horse of the pair should not prove to be such as the plaintiff intended to buy, and the defendant intended to sell, that it should be returned by the plaintiff to the defendant, and that thereupon the defendant would supply a suitable horse—such as plaintiff intended to buy, and defendant intended

to sell—and if they should also find that the horse originally bought was not such as the parties intended it should be, and that thereupon the plaintiff returned it to defendant, and defendant sent a horse as a *loan* until the defendant should get and furnish to plaintiff a suitable horse, according to the original agreement, and the defendant has never since supplied a proper horse, according to this agreement, but has refused to do so, and the plaintiff has offered to return the *loaned* horse, but defendant has refused to receive it; that the price of the horse sold by the defendant to the plaintiff was $300, and the same has not been repaid to the plaintiff, they might, if they thought proper, give a verdict for the plaintiff. If they should not find these facts from the evidence, they should give the verdict for the defendant.

It may be that there was not, in all the evidence before the jury, a sufficient warrant to find the facts named in the charge. It is not intended here to go into that inquiry. It is quite certain, that, *excluding the letter*, there were several essential facts pointed out to them, of which there was no evidence in what was derived *orally* from witnesses.

Thus it is, in the *letter only*, that any thing is said, importing that *each* horse was separately valued in the sale at $300; for, although the pair was bought for $600, this does not, either necessarily or even probably, imply that the parties fixed *half* of that sum as the value of *each*. Indeed, the oral evidence showed, that, on the very occasion of the purchase and sale, the defendant had asked, and endeavored to obtain, $700 for the pair; that the plaintiff refused to give more than $600, saying if the defendant would get a *match* for the dark-gray horse, (the one of the pair which was never objected to,) he would give $700.

And so in regard to the fact, that the horse received by the plaintiff from the defendant, in lieu of the one which had taken *fright*, was merely *loaned* to plaintiff. This was the very *hinge* of the cause, and, excluding the letter, there was no evidence of the kind.

We are thus brought to the consideration of the questions—1. Whether the *unanswered* letter of the plaintiff was admissible at

all? 2. Was not the weight given to it on the charge improper and unjust to the defendant?

Upon the *first* of these questions, there has been, it is believed, no authoritative decision in this State. In *Holler* vs. *Weiner*, 15 P. S. R. 244, Judge Rogers has expressed his opinion very clearly on the subject. The point before the court was, whether letters written *after the commencement* of the suit by the plaintiff to the defendant, and to which the defendant had given written answers, could be given in evidence by the plaintiff. The court below had received them as evidence, and this had been excepted to by the defendant. In treating of this exception, Judge Rogers said, "The letters, although written *after* the commencement of the suit, are evidence, *because* they were responded to by the defendants. The letters were admitted as a connected whole—no objection being made to any particular part of the correspondence. *Had the defendants taken no notice of the plaintiff's letter*, THE EXCEPTION WOULD AVAIL HERE." But this was *extra-judicial*, as no such question was before the court; and in *Fraley* vs. *Bispham*, 10 P. S. R. 320, where the question was, whether a quantity of tobacco had been sold with a warranty as to quality, the plaintiffs offered in evidence an account sent to defendant, in which the cost and charges, and the net proceeds of the tobacco, resulted in a loss of $1,690, accompanied with a letter from them to the defendant, in which they said, "Having received an account of the sales of 50 hhds. of tobacco, purchased from you last September, under a guaranty that you would reimburse us for any loss which we might sustain by that shipment, we now annex a statement of our claim for loss, amounting to $1,690, to the settlement of which we ask your early attention." No notice was taken by the defendant of this letter, and, after waiting a year or two, the plaintiff sent a *second* letter, containing similar allegations as to the warranty of the tobacco and its inferior quality, together with a statement of $1,690 as a loss to them, for which they requested payment and a *reply*. The defendant made no answer to this letter. The account and letters were offered in evidence, and rejected by the court. This rejection was made the subject of a bill of exceptions.

The Supreme Court sustained the ruling of the court below.

This decision would be exactly in point, had not the court placed the rejection expressly on the ground, that the evidence was not admissible on a count *for an account stated*, under which it was specially offered. The language of the court, however, approximates very nearly to a recognition of the principle, that the letters not having been answered, were not evidence at all against the defendant.

There have been several cases in the English courts, in which this question has been passed upon. In *Fairlie* vs. *Denton*, 3 C. & P. 103, the plaintiff, in an action for money had and received, offered in evidence a letter written by him to the defendant, demanding payment of a sum of money, no answer had been returned by the defendant.

Lord Tenterden rejected the evidence, saying, "It is too much to say that a man, by omitting to answer a letter, admits the truth of the statement that letter contains."

In *Richards* vs. *Frankum*, 9 C. & P. 221, *Baron Gurney*, who was then sitting at *Nisi Prius*, said, "What the defendant writes, is evidence for the plaintiff; but the plaintiff cannot make evidence for himself by his attorney writing to the defendant. That can be done *only* for the purpose of showing either *notice* or a *demand*."

The exceptions named, make the rule a sensible one, because *notice* and *demand* are, in the cases in which such evidence is received, positive facts, which the party is bound to prove to make out his cause of action; and it is of no importance whether the other party receives them silently or gives an answer. They require, in their nature, no answer.

In *Draper* vs. *Crofts & Bartlett*, 15 M. & W. 166, this subject was carefully discussed. The case was this: "Assumpsit for use and occupation of a messuage. The defendant, *Crofts*, pleaded *non assumpsit and payment*. *Bartlett* suffered judgment by default.

At the trial before *Baron Platt*, it appeared that the plaintiff had let the premises to the two defendants, by a written agreement, for three years, from Lady-day, 1840, to Lady-day, 1843. *Bartlett* alone actually occupied the premises and paid the rent, and, after

the expiration of the three years, he held over down to the year 1845.

There was no evidence of any assent of *Crofts* to this holding over, *and the only* evidence offered *to show his knowledge of it*, was the following letter, which was written and sent him by the plaintiff's attorney on the 2d of March, 1844:

SIR: I beg to call on you for payment of 43*l.* 15*s.*, remaining due from you and Mr. Theophilus Bartlett for rent of Mr. Draper's premises, up to Christmas last, and I hope to receive it next Thursday.

The defendant returned no answer to this letter; and its reception in evidence was objected to on his part, on the ground that it furnished no evidence against him. The learned judge, however, received it. A verdict was rendered for the plaintiff; and, on motion for a new trial, the verdict was set aside, but on a ground distinct from any objection to the letter as being unanswered.

But the admissibility of the letter was discussed by counsel, and adverted to by the judges—Parke, B., in particular, dealing with the subject at considerable length. After disposing of the main question in the case, he said: "With respect to the *letter*, it seems to me that *Crofts*, who stood at that time in the situation of a mere stranger, was not bound to return any answer to the demand for rent. Whether it was strictly admissible or not, it is hardly necessary to say. There was a difference between the late Lord Abinger and the other members of the court *on this very point.* The Lord Chief Baron (Abinger) thought that a letter, such as this, was *not admissible at all;* others, that it was admissible, *but not worth any thing* when admitted. My own opinion is, that no attention at all need be paid to a letter asking for money which the party does not owe. It is a different case, if he is bound by circumstances or by his situation, to return an answer. I think, therefore, not that such evidence is absolutely inadmissible, *but that it is worth very little when admitted.*"

Draper vs. *Crofts*, was decided in 1846. A later case, decided in the Queen's Bench in 1850, is reported in 14 Queen's Bench Rep. 664, as *Gaskill* vs. *Skene.*

This was assumpsit for money had and received.

On the trial before Lord Denman, C. J., it appeared that a Mr. Dobie had been employed to compound with the plaintiff's creditors by paying each of them 10*s.* in the pound, and that he had paid defendant 26*l.* 2*s.* 6*d.* as 10*s.* in the pound on a debt of 52*l.* 5*s.* Subsequently, Mr. Price, who was employed as accountant for the plaintiff's estate, wrote four letters to the defendant, *to which he received no answer.*

The plaintiff's counsel, having called for these letters, which were not produced, offered secondary evidence of their contents. The defendant's counsel objected that they could not be evidence unless it were shown that the defendant, in some way, acted upon them. The Lord Chief Justice received the evidence. The first letter was as follows:

December 3, 1846.

Mr. Dobie has handed me your letter of the 26th May last, acknowledging the receipt of check for 26*l.* 2*s.* 6*d.*, being 10*s.* in the pound on your former account of 52*l.* 5*s.* against Mr Gaskill, and also enclosing another account for 4*l.* 5*s.* 6*d.*, which latter claim not being included in my list of liabilities, he requested me, as accountant to the estate, to examine and arrange with you. I find this latter account correct in every respect; but, with regard to the former account, have just discovered, that, through an oversight, it was sent to Mr. Dobie as being unpaid, although I now find it was settled by Mr. Gaskill himself, in October last year, in full by a check for 39*l.* 10*s.*, which was never returned to Mr. G.'s clerk in the cash account, and was not, consequently, posted to your debit in the ledger, and therefore included in the list of creditors. You will be good enough, therefore, to look to your cash account of that date, (October, 1845,) where you will find my statements correct, and I shall be happy to hear from you on the subject per return; and, if you will oblige me with the name of your London agent, I shall be happy to wait on him with the receipts for both payments, and we can then come to an arrangement as to the account for the 4*l.* 5*s.* 6*d.*

The other letters referred to this, and complained that no answer was given. There was also evidence of *a conversation* with the defendant, in which he acknowledged that he had received the check for 39*l.* 10*s.*, but said he had agreed to take off only 5 per cent. discount from the 52*l.* 5*s.*, and had received the check on account of the balance, and not in discharge of the whole. A receipt for 47*l.*, signed by the defendant, was put in; but the sum of 47*l.* was written on an erasure, and it was not explained, on any hypothesis, how that sum was come to.

The Lord Chief Justice, in summing up, told the jury that the letters were not evidence of the truth of the statements contained in them; but that the silence of the defendant, after receiving such letters, was a fact from which they might draw an inference. He left it to the jury to find for the plaintiff or defendant, according as they thought that the debt of 52*l.* 5*s.* had or had not been discharged before the payment by Mr. Dobie.

The verdict was for the plaintiff.

A rule *nisi* for a new trial was obtained, on the grounds of the improper reception of evidence and of misdirection.

This rule was, after full argument *in banc*, discharged. All the judges were present, except Lord Denman, who was absent on account of ill health.

This is a very important case, as it involved the two questions—first, of the admissibility of the letters in evidence; and second, of the proper directions to the jury.

Three of the four judges who sat at the argument, gave their opinions on both points—all concurring in the propriety of the ruling as to the reception of the letters in evidence, and also in approval of the directions to the jury.

As to the letters, the opinion expressed was, that a letter, though unanswered, was evidence of a *demand* by the plaintiff, which it was proper in him to make; and that to make a demand *intelligible*, it was generally necessary to give some statement of facts on which the demand was made, and that the letters received in evidence did not go further than was requisite for that purpose.

We think this decision places the subject on its true grounds; and the result of the whole of the cases seems to be, that an unanswered letter offered by the party by or for whom it was written, if it be restricted to making a *demand* where this is requisite, or giving a notice merely, is always admissible; that, if it contain statements of a different nature, and evidently framed for a different purpose, and these derive no support from other evidence in the cause, it should be wholly excluded; but, if the statements do not go beyond what is necessary to render the demand or notice intelligible, or there is other consentaneous evidence, the whole may be submitted to the con-

sideration of the jury. But that it is the duty of the court, whenever such a letter is received, to scan its contents rigorously, and make such discriminating observations to the jury, that they may be prevented from giving undue weight to what has been so written.

The letter of the plaintiff to the defendant of 11th April, 1859, besides the offer of the return of the horse, which was proper in itself, but not necessary in this particular case, inasmuch as an *oral* offer of the same kind had been previously made, and was in evidence, states, with more or less distinctness, these several facts: 1st. That the price paid for the *returned* horse which had taken *fright*, was $300; 2d. That the horse taken in its place was given and received as a *loan* merely, and for a well understood purpose; and 3d. That the reason of the return of the one horse and the *temporary* substitution of the other was, that, in the bargain and sale of the pair, the parties had agreed that the horses, besides being *sound*, for which there was a *written* warranty, should be "kind and free from fault."

With respect to the *first* of these statements, we have already remarked, that it had no other warrant but the fact that *double* the sum named had been paid for the *pair;* whilst the *oral* evidence of what occurred at the time when the contract was made, was inconsistent with this inference. The only evidence as to the *loan* of the horse, was the fact that another horse had been sent by defendant to the plaintiff shortly after the substitution; and a proposition, in respect to a further effort similar in object, was spoken of by one of the witnesses. But this had nothing definite in it, and was susceptible of an opposite construction. As to the understanding that the horses should be *free from fault*, the written warranty of *soundness*, and nothing more, affords so strong an implication that the plaintiff trusted to the full trial which he had made of the horses before the purchase, and had stipulated for nothing else, that the indistinct allusions in the letter must be regarded as standing without any collateral support.

It is not necessary to decide whether or not the letter of the 11th of April, 1859, was properly admitted, but we hold that the charge was defective in not directing the attention of the jury to the weakness, not

to say insufficiency, of the statements, which have been indicated as a groundwork of a verdict for the plaintiff. It may be that, on another trial, the plaintiff may be able to supply what we deem defective in his oral evidence on this occasion, and that proper observations may then be made in the charge, and the result, whatever it may be, prove altogether satisfactory.

As it is, we have no other course left but to set the verdict aside and grant a new trial. Rule absolute.

In the Supreme Court of Iowa, December Term, 1859.—*In Equity.*

COOK AND SARGENT, APPELLANTS, *vs.* JOHN F. DILLON, SPIER WHITAKER, ASA BRIGGS AND ALEX. H. BARROW.

1 Where land is conveyed to a trustee, to secure payment of a promissory note made by the grantor, with power to the trustee, on failure to pay the note when due, to sell the land, and out of the proceeds to pay the note, and pay over the surplus, if any, to the grantor, judgments recovered against the grantor after the conveyance and before sale of the land by the trustee, being liens upon the grantor's interest in the land, and in equity, liens upon the surplus proceeds of the land in the hands of the trustee, after sale by him.

2 But in such case, where the judgments were of the same date, and one judgment creditor issued execution and garnisheed the fund in the hands of the trustee, before the other judgment creditors had taken any steps to assert their lien: *Held*, that he thereby acquired a prior right to the fund.

3. And when one of the judgment creditors became the purchaser of the land at the sale of the trustee, for a price exceeding the debt secured by the deed of trust; *Held* that such purchaser could not set-off his judgment against such surplus, so as to defeat the claim of another judgment creditor who had garnisheed the trustee under execution on his judgment, although such surplus had not in fact been paid over to the trustee by the purchaser.

4. As between judgment creditors whose judgments are of the same date, the one who first takes steps to enforce his judgment against property, whether real or personal, subject to the lien of the judgments, acquires a priority as to such property.

On the 2d of April, 1857, the defendant Barrow, by deed of that date, conveyed to the defendant Dillon, as trustee, certain real estate in trust, to secure the payment of certain promissory notes made by